IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2006-0315
	)	DEPARTMENT B
v.	)	
	)	MEMORANDUM DECISION
JEFFREY PETER TULL,	)	Not for Publication
	)	Rule 111, Rules of
Appellant.	)	the Supreme Court
	)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR 200501227

Honorable David M. Roer, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Julia A. Done — Phoenix
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Appellant Jeffrey Tull was convicted after a jury trial of one count each of possession of marijuana for sale, a class two felony; production of marijuana, a class three felony; possession of methamphetamine, a class four felony; possession of drug paraphernalia, a class six felony; and child abuse by permitting a child to be placed in a

situation endangering her physical health, a class four felony. Tull was sentenced to concurrent, presumptive terms of imprisonment for marijuana possession, marijuana production, and possession of paraphernalia, the longest being five years. For the two remaining convictions, he was placed on one day of unsupervised probation for possessing methamphetamine and ten years of supervised probation for child abuse. On appeal, Tull challenges the trial court's denial of his motion for a new trial pursuant to Rule 24.1, Ariz. R. Crim. P., and complains there was insufficient evidence to support his convictions on three of the counts. Finding no error, we affirm.

Factual and Procedural Background

¶2 In July 2005, acting on a citizen tip, the Pinal County Narcotics Task Force discovered marijuana growing in a desert area near some trailer homes. While conducting surveillance on the marijuana, they observed Tull approach the plants with a water container. After Tull began watering the marijuana plants, he was arrested. Tull then told officers his two-year-old daughter, H., was in a trailer home about one hundred yards from where the marijuana was growing. Officers entered the trailer to check on the child's welfare, then obtained a search warrant and searched it. Because of the distance to the trailer, the officers needed to use two-way radios to communicate between the trailer and the marijuana plot.

¶3 Inside the unkempt trailer, officers found drugs, a digital scale, a balance scale, and other drug paraphernalia. They also found a plastic bag of marijuana leaves "in the master bedroom on top of the dresser," a "glass pipe with [black] residue" on a computer desk in the living room area, and two baggies of methamphetamine placed together near

children's toys where "a child could have easily accessed it." The officers found the trailer uncomfortably hot in every room except the master bedroom, which was noticeably cooler. When officers found H., who was alone in the trailer, she appeared to be sleeping but was tossing and turning and her cheeks were red and flushed.

¶4 Tull and the apparent lessee of the trailer, Jennifer Hutton, were originally to be tried together, but Hutton's trial was severed from Tull's after her counsel became ill. At Tull's trial, he and the state stipulated that two plastic bags submitted to the Department of Public Safety (DPS) crime laboratory contained 1.03 grams of methamphetamine, another bag contained one-tenth of a gram of marijuana, and the digital scale contained methamphetamine residue. The marijuana plants were submitted for analysis in two bags; one bag contained decomposing plants that could not be analyzed, and the other yielded 61.81 grams of usable marijuana. At trial, a qualified expert witness testified that 20.5 pounds of plants removed from two small plots near the trailer could yield about five pounds of usable marijuana. Tull was convicted and sentenced as noted above, and this appeal followed.

Sufficiency of the Evidence

¶5 Tull argues there was insufficient evidence to support his convictions "on counts three, four, and five." Those charges, respectively, were for possession of methamphetamine, possession of paraphernalia, and child abuse. However, Tull does not claim the trial court erred by denying the motion for acquittal he made at the close of the state's case pursuant to Rule 20, Ariz. R. Crim. P. Because he does not challenge that ruling,

we review the sufficiency of all the evidence presented during trial to support the jury's verdict.

¶6 Every conviction must be based on "substantial evidence," Rule 20(a), "which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). We reverse a conviction for insufficient evidence "only if 'there is a complete absence of probative facts to support [the jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). We view the evidence in the light most favorable to sustaining the conviction and resolve all inferences against the defendant. *State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶7 Tull first argues there was no evidence linking him to "the marijuana and drug items found in the bedroom" and therefore his possession conviction on "count three" cannot stand. But he was charged and convicted under count three of possessing methamphetamine in violation of A.R.S. § 13-3407. Possession of marijuana is proscribed under A.R.S. § 13-3405, and Tull was convicted under that statute of producing and possessing it for sale, based on the plants growing outside the trailer.[1] Thus, Tull is arguing that insufficient evidence supports a conviction that does not exist. Because Tull has not actually challenged

[1]Although Tull admitted in his testimony that the marijuana in the bedroom was his, it appears he was not charged with its possession.

his conviction for possession of methamphetamine, we do not address his arguments as to count three any further. *See* Rule 31.13(c)(1)(iv), (v), Ariz. R. Crim. P.

¶8 Tull was charged in count four with possession of drug paraphernalia based on his possession of "scales" and "plastic baggies."[2] Tull contends there was no evidence connecting him to the trailer where the paraphernalia was found because he denied having a key to the trailer, no paperwork with his name was found in the trailer, and he claimed the men's clothing in the trailer was not his. But Tull admitted ownership of the plastic bag containing marijuana found on the dresser. Section 13-3415, A.R.S., criminalizes possession of drug paraphernalia, which it defines in part as "capsules, balloons, envelopes and *other containers* used, intended for use or designed for use in packaging small quantities of drugs." A.R.S. § 13-3414(F)(2)(i) (emphasis added). Although items of paraphernalia such as plastic bags may not be "unlawful per se," they become prohibited items based on "the extent that they are used or intended to be used in conjunction with a controlled substance." *State v. Estrada*, 197 Ariz. 383, ¶ 21, 4 P.3d 438, 442 (App. 2000). To determine whether such an object is paraphernalia, the statute lists factors to be considered, including, *inter alia*, "[s]tatements by an owner . . . concerning its use," "[t]he proximity of the object to drugs," and "[t]he existence of any residue of drugs on the object." § 13-3415(E)(1), (4), (5). The

[2]The state argues at length that evidence of a pipe seen by one officer on Tull's person when he was arrested supports this conviction. But Tull was not charged with possessing a pipe, and thus we do not consider those arguments. The state also discusses the undisputed presence of "roach clips" in the trailer. But, for the same reasons, because Tull was not charged with possessing the clips, we likewise do not consider those arguments.

jury could have found Tull guilty of possessing paraphernalia based upon his admitted ownership of the plastic bag containing marijuana.[3]

¶9 Moreover, to show Tull possessed the scales, the state needed only show he had dominion or control over the place where that paraphernalia was found. *See State v. Cota*, 191 Ariz. 380, ¶ 8, 956 P.2d 507, 509 (1998) (possession requires control and knowledge of what the contraband is and its presence); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965 P.2d 94, 97 (App. 1998) (constructive possession is dominion and control over property even if not physically possessed); *State v. Curtis*, 114 Ariz. 527, 528, 562 P.2d 407, 408 (App. 1977) ("the critical question here is whether there is evidence that appellant exercised dominion and control"). Although Tull denied knowledge of the digital scale seized from the trailer, he identified a set of balance scales, claiming they were a decorative object representing Hutton's astrological sign of Libra.

¶10 The jury could find from Tull's testimony that he had exercised control over the trailer. When the officers arrived, he was near the trailer with his two-year-old daughter inside, and he admitted the marijuana in the master bedroom was his. Tull testified he visited the trailer frequently to care for the marijuana plants, including using the trailer's water supply for the plants, and he admitted he was the man the tipster had seen watering the plants regularly. Officers found men's clothing and shoes inside the trailer, and there was testimony— albeit conflicting—about how often Tull visited the trailer and stayed overnight.

[3]The jury also found Tull guilty of possessing the two plastic bags containing methamphetamine found in the trailer's living room area.

Finally, Tull was familiar with household details about the trailer, including an unusual drainage system for the washing machine; which air conditioning units in the trailer were working and which were not; and when an electrician was expected to arrive to repair the air conditioning. From this circumstantial evidence, the jury could determine Tull had control over the trailer and, therefore, control over the paraphernalia found inside. *See Cota*, 191 Ariz. 380, ¶ 8, 956 P.2d at 509; *Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965 P.2d at 97; *Curtis*, 114 Ariz. at 528, 562 P.2d at 408.

¶11 Tull next argues no evidence supports his conviction for child abuse because nothing presented at trial "suggest[ed] that H. was ever awake and in any of the rooms where she would have had access to the drug paraphernalia." Tull was charged with "knowingly committ[ing] [c]hild [a]buse by, under circumstances other than those likely to cause death or serious physical injury, . . . caus[ing] or permit[ting] the person or health of such child to be placed in a situation where [her] physical health is endangered" in violation of A.R.S. § 13-3623(b)(1).

¶12 Arizona cases have generally held that an excessively dirty or unkempt home can support a conviction for negligent child abuse under § 13-3623(B)(1). *State v. Greene*, 168 Ariz. 104, 105, 108, 811 P.2d 356, 357, 360 (App. 1991) (house "extremely dirty" with "rotting food," "[d]ebris and trash" throughout house, piles of clothing on the floor, and no working heat sufficient to support conviction "under circumstances other than those likely to cause death or serious physical injury"); *State v. Deskins*, 152 Ariz. 209, 210-11, 731 P.2d 104, 105-06 (App. 1986) ("unsanitary" home contained "leaking portable toilet," "scrap

lumber with protruding nails," "scrap metal automobile parts, tin cans and other discarded items"; children "slept in close proximity to animals which appeared to be diseased" and had no shoes despite conditions in home); *State v. Smith*, 130 Ariz. 74, 75, 634 P.2d 1, 2 (App. 1981) (home "filthy, unsanitary and in shambles" including spoiled food and insects in kitchen).

¶13 Here, when officers entered the trailer, they noticed a "bad" odor and found rotting food in the refrigerator and in unwashed dishes and pans around the kitchen. There was methamphetamine and a glass pipe containing residue within a toddler's reach and near children's toys, and H. had been left unsupervised inside the trailer.[4] The residence was in complete disarray, with "piles of clothes and other items" throughout. The only working air conditioning was in the master bedroom, which was not the room where H. was found, and officers stated she had seemed "very uncomfortable," noting they had also been very hot and sweating while inside the trailer on that July day. In addition, the state's expert testified about general dangers inherent in growing marijuana that extend to anyone in the vicinity of the operation. All of this evidence supports the jury's verdict that Tull had "knowingly" left H. "in a situation where [her physical health] . . . [was] endangered." A.R.S. § 13-3623(B)(1).

[4]Division One of this court, in *State v. Johnson*, 181 Ariz. 346, 350, 890 P.3d 641, 645 (App. 1995), has held that drugs left within reach of young children can support a conviction under former A.R.S. § 13-3623(B), abuse "[u]nder circumstances likely to produce death or serious physical injury." *See* 2000 Ariz. Sess. Laws, ch. 50, § 4.

¶14 Notwithstanding Tull's contention that there was no evidence H. was ever awake to see or explore the conditions in the trailer, we note that Division One of this court has held that the word "'endanger' in section 13-3623 means to subject to potential harm." *State v. Mahaney*, 193 Ariz. 566, 569, 975 P.2d 156, 159 (App. 1999). Because H. was exposed to conditions which could have endangered her health, and because the jury could infer H. could have awoken at any time, it could find from the evidence presented that Tull was guilty of child abuse under § 13-3623(B)(1). *See State v. Johnson*, 181 Ariz. 346, 350, 890 P.3d 641, 645 (App. 1995); *Greene*, 168 Ariz. at 108, 811 P.2d at 360; *Deskins*, 152 Ariz. at 210-11, 731 P.2d at 105-06; *Smith*, 130 Ariz. at 75, 634 P.2d at 2.

Motion for New Trial

¶15 Tull lastly argues the trial court erred by denying his motion for a new trial pursuant to Rule 24.1, Ariz. R. Crim. P. The state counters that, because the motion was not timely filed, the court properly concluded the untimely filing had deprived it of jurisdiction to grant a new trial. We review the trial court's determination on a Rule 24.1 motion for an abuse of discretion. *See State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996).

¶16 "The time limit for a motion for new trial in a criminal case is jurisdictional." *State v. Wagstaff*, 161 Ariz. 66, 70, 775 P.2d 1130, 1134 (App. 1988); *see also State v. Saenz*, 197 Ariz. 487, ¶ 6, 4 P.3d 1030, 1032 (App. 2000) (Rule 24.1 motion for new trial "must be filed no later than ten days after the verdict is rendered"). Tull filed his motion on August 21, the day of his sentencing hearing, nearly four months after the verdicts were rendered on April 27. The trial court therefore lacked jurisdiction to address the merits of

Tull's untimely motion, as it correctly found. *See Saenz*, 197 Ariz. 487, ¶ 6, 4 P.3d at 1032; *Wagstaff*, 161 Ariz. at 70-71, 775 P.2d at 1134-35.

¶17 Moreover, although Tull relied solely on Rule 24.1(c)(4) and (c)(5) before the trial court, on appeal he asserts newly discovered evidence under Rule 24.2, Ariz. R. Crim. P., as his basis for appellate relief.[5] Tull has waived any Rule 24.2 argument by failing to raise it below. In addition, even had he properly preserved the argument, it lacks merit because the evidence Tull claims is newly discovered was actually presented to the jury at his trial.

¶18 Tull contends the criminalist's report showing some of the marijuana from the plants he was growing weighed 61.81 grams "was not available to his attorney at the time of trial." But he stipulated to this fact and it was presented to the jury. Tull's argument, to the extent we understand it, is that rulings on motions in limine filed in Hutton's case somehow render the evidence presented to the jury in his case newly discovered.[6] Although we have no record of Hutton's trial, Tull claims Hutton successfully moved to preclude evidence of the decomposed marijuana plants that could not be analyzed and any statements that the condition of the trailer was typical of particular types of drug users. Tull, in contrast, stipulated to the DPS criminalist's reports, which noted some of the marijuana plants were

[5]Rule 24.1(c)(4) provides for a new trial when "[t]he court has erred in the decision of a matter of law, or in the instruction of the jury on a matter of law to the substantial prejudice of a party." Subsection (c)(5) applies when "[f]or any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial."

[6]The state asserts these rulings were actually held in abeyance and could be reurged at Hutton's trial.

too decomposed for any analysis, and he did not object to testimony that the condition of the trailer was typical of some drug users. "For it to be considered newly discovered, evidence 'must truly be newly discovered, i.e., discovered after the trial.'" *Saenz*, 197 Ariz. 487, ¶ 14, 4 P.3d at 1034, *quoting State v. Jeffers*, 135 Ariz. 404, 426, 661 P.2d 1105, 1127 (1983); *see also State v. Anderson*, 17 Ariz. App. 555, 556, 499 P.2d 169, 170 (1972). Because all of the evidence about which Tull complains was presented at his trial, it is not newly discovered. *Cf. Anderson*, 17 Ariz. App. at 556, 499 P.2d at 170 ("A new trial will not be granted to permit the introduction of the testimony of a witness whose identity was known by the moving party at the time of the original trial.").

Disposition

¶19 For the reasons set forth above, Tull's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

JOHN PELANDER, Chief Judge